Filed 4/19/19 P. v. Cromer CA4/2
See Concurring Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AARON RICHARD CROMER, Defendants and Appellants.	E069960 (Super.Ct.No. FVI1502150) OPINION

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull and Raymond L. Haight III, Judges. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kelley Johnson and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Aaron Richard Cromer was involved in a road rage incident during which he intentionally rammed into another driver while driving southbound on the 1-15 Freeway in San Bernardino County.

Defendant was convicted of assault with a deadly weapon, an automobile, within the meaning of Penal Code section 245, subdivision (a)(1),[1] and vandalism under $400, a misdemeanor, within the meaning of section 594, subdivision (b)(2)(A). Defendant was sentenced to three years in state prison.

On appeal, defendant claims instructional error on the assault with a deadly weapon charge requires reversal of his conviction because the jury was instructed on an inadequate legal theory; and the trial court erred by denying his *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) motion to relieve counsel based on its inadequate inquiry into the reasons for substituting counsel.

FACTUAL AND PROCEDURAL HISTORY

A. PEOPLE'S CASE-IN-CHIEF

Sometime during the late afternoon of May 3, 2015, Rodney Haggstrom was driving southbound on the I-15 Freeway in San Bernardino County. He was returning to Orange County from a weekend visiting his family in Las Vegas. He was driving a rental car. While driving, he got behind a red pickup truck, which was in the middle lane of three lanes. The driver of the red pickup truck, later identified as defendant, was weaving all over the road. Haggstrom pulled into the truck lane to the right of the middle lane to

[1] All further statutory references are to the Penal Code unless otherwise indicated.

try to get past defendant before he caused an accident. As he started to pass the red truck, it drifted over and almost hit him.

Haggstrom was able to get by and he kept driving. As he was driving down the freeway going 75 to 80 miles an hour, he was suddenly bumped from behind by defendant. Haggstrom was able to control his vehicle. There were no other cars in the immediate vicinity. Defendant pulled up next to Haggstrom. Haggstrom rolled down his passenger's side window. Defendant had his head out the window with his tongue hanging out. He looked like a "nut." Haggstrom yelled to defendant "What is wrong with you?" and defendant did not respond.

Haggstrom sped up to 90 miles per hour to get away from defendant. Haggstrom thought that defendant was on drugs. Haggstrom continued driving in the fast lane; defendant was in the middle lane. Haggstrom called the police and they told him to pull over until they could respond. Haggstrom did not want defendant to get away so he continued to drive. Haggstrom sped up; defendant caught up to him and bumped him a second time. Defendant got beside Haggstrom and swerved into Haggstrom. Defendant's truck scratched the passenger's side mirror. Haggstrom's car swerved into the dirt on the shoulder, but he kept control of his vehicle. Haggstrom slowed down and let defendant get ahead of him. Defendant began to exit the freeway. Haggstrom pulled into the emergency lane on the side of the road just past the exit and started to back up to keep defendant in sight until the police arrived. As he was backing up, defendant crossed over the dirt between the exit lane and the freeway and headed directly for Haggstrom. Haggstrom quickly got back on the freeway but not before defendant hit him again.

Defendant and Haggstrom continued driving on the freeway. Haggstrom drove fast trying to get away from defendant. Haggstrom came upon some cars and had to slow down. At that point, defendant slammed into the back of his car. Haggstrom's car began to fishtail but he was able to keep control of the car. Defendant drove in front of Haggstrom and Haggstrom continued to follow him.

California Highway Patrol (CHP) Officer Tirrell Hayes was assigned to the Barstow Highway Patrol Station on May 3, 2015. He was advised of a road rage incident occurring approximately 25 miles north of Baker, and that a sheriff's deputy had pulled over defendant and Haggstrom in Baker. Officer Hayes spoke with defendant, who was in the driver's seat of his truck. Defendant had a dog with him in the truck. Defendant insisted he had been driving in the middle lane southbound on the I-15 Freeway when Haggstrom passed him on the right. As Haggstrom was passing him, Haggstrom flipped off defendant.

Defendant continued driving but soon saw Haggstrom's vehicle in front of him "brake checking him." Officer Hayes explained that "brake checking" was when someone puts on his or her brakes for no apparent reason but in an effort to cause another person to slow down or to intentionally cause an accident. Defendant told Officer Hayes he had on his cruise control and he did not intend to stop. He rear-ended Haggstrom's vehicle one time. Defendant claimed he did not call the police because he did not have his phone. He also stated he had to "stick up" for himself because he was disabled. Defendant admitted he intentionally hit Haggstrom's car. He struck Haggstrom's car because he was upset with him for flipping him off and brake checking him.

Neither Haggstrom nor defendant appeared to be intoxicated. Defendant did not complain of any mechanical trouble with his truck. Officer Hayes inspected the two vehicles. Based on the damage, it was apparent defendant hit Haggstrom from behind. There were white marks on defendant's truck that matched Haggstrom's car's paint.

Officer Hayes indicated it was impossible to determine the rate of speed based on the damage to the vehicles. Haggstrom's air bags did not deploy but Officer Hayes indicated they commonly would not deploy during a rear-end collision. Haggstrom denied that he flipped off defendant when he first passed him; he merely raised his arms to ask what defendant was doing. Haggstrom told Officer Hayes he had not been injured. Haggstrom had over $3,000 of damage to the back end of his car, which had to be paid to the rental car company.

B. DEFENSE CASE

CHP Officer Hayes was recalled by the defense. He observed defendant had a firearm in his vehicle during this incident; it was not used. Haggstrom had no front-end damage to his car.

Defendant testified on his own behalf. Defendant first noticed Haggstrom when he drove by him and Haggstrom threw up his hands at him; he was not sure Haggstrom flipped him off. Haggstrom got in front of defendant and started brake checking him. Defendant had his cruise control on when Haggstrom put on his brakes. He did not have time to put his foot on the brake so he bumped Haggstrom. They did not pull over to the side of the road. Defendant turned off his cruise control and slowed down. Haggstrom was in front of him. Defendant was trying to get away.

Haggstrom continued to put on his brakes. Defendant felt he was trying to cause an accident. Defendant went past Haggstrom and Haggstrom began chasing him. Haggstrom bumped into the back of his truck. Defendant insisted that Haggstrom caused damage to his truck. Haggstrom continued to chase defendant. Defendant observed Haggstrom get off the freeway. Defendant drove off quickly down the freeway to get away from Haggstrom. Defendant continued to drive until he was pulled over by a sheriff's deputy in Baker.

Defendant told Officer Hayes it was his fault he rear-ended Haggstrom's car but he assumed since he hit Haggstrom, he had to be at fault. Defendant never touched the firearm in his truck. Defendant never called the police. Defendant needed additional time to react while driving because he was disabled. He denied he ever hung his head out the window or hit Haggstrom's car so hard it caused Haggstrom's car to fishtail.

Officer Hayes was called in rebuttal. He insisted defendant told him he intentionally hit Haggstrom's car because he was upset by his actions. Defendant told him "I had my cruise control on and I wasn't going to stop." Defendant admitted fault.

DISCUSSION

A. ASSAULT WITH A DEADLY WEAPON INSTRUCTIONAL ERROR

Defendant insists, relying upon *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105 (*Aledamat*), that his conviction of assault with a deadly weapon must be reversed due to instructional error. Defendant contends the trial court instructed the jury with a legally incorrect theory when it instructed the jury with CALCRIM No. 875. Since the jury was presented with a legally incorrect theory, that an

automobile is an inherently deadly weapon, reversal is required. The People respond that any error in the instruction presented an incorrect factual theory to the jury, not an incorrect legal theory, and even if it constituted a legally invalid theory, it was harmless beyond a reasonable doubt.

1. *INSTRUCTION TO THE JURY*

The jury was instructed that defendant was charged with assault with a deadly weapon, and it must conclude whether the evidence presented supported the charge. They were instructed, "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone; [¶] 4. When the defendant acted, he had the present ability to apply force with a deadly weapon to a person." The instructions defined willfully, great bodily injury, and touching.

The instruction then defined deadly weapon as follows: "A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." Great bodily injury was defined as "significant or substantial physical injury. . . . It is an injury that is greater than minor or moderate harm." CALCRIM No. 875 also instructed, "No one needs to actually have been injured by defendant's act. But if someone was injured,

you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was."[2]

2. *STANDARD OF REVIEW FOR PREJUDICE*

It is well established that an automobile is not an inherently deadly weapon. (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1054.) As such, the portion of CALCRIM No. 875, which advised the jurors that defendant had to do an act with a deadly weapon, and that deadly weapon, here the automobile, was defined as any object, instrument, or weapon that is inherently deadly, was erroneous. The parties dispute the correct standard of review for prejudice and whether such error here is reversible or harmless error.

The inclusion of the instruction that the vehicle was an inherently deadly weapon was legal error. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318 (*Stutelberg*).) In *People v. Merritt* (2017) 2 Cal.5th 819, the California Supreme Court concluded that the failure to instruct on the elements of a crime is subject to harmless error analysis, e.g. "determin[ing] whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*Id.* at pp. 829, 831.) This is the traditional *Chapman v. California* (1967) 386 U.S. 18 beyond-a-reasonable-doubt standard. Prior to *Merritt*, in *People v. Chun* (2009) 45 Cal.4th 1172, the court expressed in a case involving instruction with a legally invalid theory that "to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury

[2] Defendant did not object to CALCRIM No. 875. However, the People do not argue that he has waived the issue on appeal.

based its verdict on a legally valid theory." (*Id.* at p. 1203.)[3] We review the entire record to determine whether it demonstrates beyond a reasonable doubt that the error did not change the outcome of the case. (*Merritt*, at p. 831; *Stutelberg*, at p. 321 ["we choose to follow the traditional *Chapman* standard, which allows us to affirm where a review of the entire record demonstrates beyond a reasonable doubt that the error did not change the outcome"].)

3. *PREJUDICE IN THIS CASE*

Here, the jury was presented with a legally valid theory (the automobile could be considered a deadly weapon because it was used in a manner that was capable of causing and likely to cause great bodily injury) and an invalid legal theory (the automobile was an inherently deadly weapon). Curiously, the People argue, "The instruction did not tell the jury that an automobile was an 'inherently deadly' weapon. It did not define the term 'deadly weapon' at all." As such, the jurors relied on the common meaning of automobile, which they clearly understood was not an inherently deadly weapon. This argument is contradicted by the instructions in this case. CALCRIM No. 875 specifically defined deadly weapon and it erroneously stated that an automobile could be considered an inherently deadly weapon.

Here, the jury was presented with evidence that defendant hit Haggstrom's vehicle on four separate occasions: initially bumped him; swiped the side mirror; hit him at the

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[3] In *Aledamat*, *supra*, 20 Cal.App.5th at p. 1153, the appellate court applied the standard that the reviewing court must find that the jury *actually relied* upon the valid legal theory for the error to be found harmless. The California Supreme Court has granted review in *Aledamat*.

offramp; and hit him hard from behind causing Haggstrom's car to fishtail. They were instructed that they must find only one or all of these acts supported the charge of assault with a deadly weapon. They were advised, "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the these [*sic*] acts and you all agree on which act he committed."

The prosecutor argued in her opening argument, "So all it [assault] is is an act. It's vague. It can be anything. And here we have the act of ramming someone with a pickup truck. That is an act. The pickup truck is the deadly weapon. It's used in this circumstance on the freeway, it's a deadly weapon. And nailing someone on the highway with a pickup truck, that will apply force to somebody. Check. Done."

Defense counsel argued that defendant had to willfully hit Haggstrom's car to be guilty of assault with a deadly weapon. No one was hurt, which would have occurred if he intentionally hit Haggstrom's car at a speed of 85 miles per hour. Defense counsel insisted that Haggstrom would have been hurt if he was hit at 85 miles per hour. Further, if defendant hit Haggstrom as hard as described by Haggstrom, the side mirror would have come off and not just be scratched. Defense counsel also argued, "And I might add that the damage to the car is just not consistent with what Mr. Haggstrom says. He says he was hit four times. You look at that picture, that doesn't look like four different hits. [¶] And, again, I point out that if [defendant] hit Mr. Haggstrom at 85 miles an hour,

even if they were both going the same speed, something would have happened to [defendant's dog]."

In response, the People argued that Haggstrom had testified that the first two bumps to his car were not "that big a deal." It was the hit from behind that caused him to fishtail and have to regain control. The prosecutor continued, "[E]ven if you conclude that the first collision was some type of accident and that the defendant didn't intend, wasn't willful, didn't willfully hit Mr. Haggstrom in that first time, you can still agree that he willfully hit him a second time. You can still all agree that he willfully hit him so hard that he was fishtailing down the freeway the third time, and you can agree that he willfully drove at him at a high rate of speed on that freeway off ramp."

Using the standard from *Stutelberg*, a review of the entire record demonstrates "beyond a reasonable doubt that the error did not change the outcome." (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 321.) Initially, defendant never disputed his truck was being used as a deadly weapon. Although he disputed he intentionally hit Haggstrom, he never disputed that his truck could be considered a deadly weapon. The prosecutor did not argue that defendant's act of just bumping Haggstrom's car with his truck was enough because the truck was an inherently deadly weapon. Rather, the prosecutor argued that defendant hit Haggstrom so hard Haggstrom fishtailed, and defendant drove at Haggstrom at a high rate of speed at the offramp.

Moreover, the jury was instructed as to the vandalism charge it must find that defendant "maliciously" damaged personal property. It was further instructed, "Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else." The jury concluded that defendant maliciously damaged Haggstrom's vehicle foreclosing the possibility that his truck was not used in a manner likely to cause great bodily injury or death. Defendant hitting Haggstrom's car occurred while defendant and Haggstrom were barreling down the I-15 Freeway in excess of 80 miles per hour. Haggstrom indicated that he was able to control his car when he was side-swiped by defendant and hit from behind but only because he considered himself a very good driver. These actions did cause him to swerve and to fishtail. He was lucky to keep the car from veering off the road or into another car. If Haggstrom had lost control of his automobile while traveling at 80 miles per hour certainly it was likely to cause great bodily injury or death.

It is true the evidence established that Haggstrom suffered no injuries. However, that is not dispositive as to whether the acts of defendant were likely to cause great bodily injury or death. Further, this case is similar to those cases finding an automobile was used in a manner constituting a deadly weapon. (See *People v. Azanvoleh* (2012) 210 Cal.App.4th 1181, 1183-1184, 1188-1189 [defendant convicted of assault with a deadly weapon for deliberately running a red light at 60 miles an hour through a crowded intersection, striking another vehicle]; *People v. Claborn* (1964) 224 Cal.App.2d 38, pp. 40-42 [no doubt defendant used automobile as a deadly weapon when he accelerated toward police car hitting it head on].)

Here, it was clear that defendant intentionally rammed his truck into Haggstrom's car causing damage. As in *Stutelberg*, "Had the jury been provided only with the 'deadly or dangerous as used' theory and not the inapplicable 'inherently deadly weapon' theory, there is no reasonable probability it would have rejected the deadly weapon enhancement . . . . Therefore, the instructional error was harmless beyond a reasonable doubt." (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 322.)

B. *MARSDEN*

Defendant was afforded three *Marsden* hearings throughout the trial court proceedings. He complains about the result of only one of those hearings, insisting that although the trial court afforded him the opportunity to list most of his reasons for removing his appointed counsel, the trial court did not allow him to explain his concerns regarding counsel lying to him.

1. *ADDITIONAL BACKGROUND*

At a pretrial hearing on December 29, 2015, defendant was represented by Deputy Public Defender Philip Zywiciel. Defendant immediately stated, "I don't want him talking for me, because he lied to me, and I need—I would like new counsel." The trial court conducted a *Marsden* hearing.

At this first *Marsden* hearing, defendant advised the trial court that Zywiciel had lied to him. Defendant insisted counsel had told him that he would get one year of probation, but the deal had been changed to three years. Counsel explained that defendant was out on his own recognizance (OR) for the felony charge when he committed a misdemeanor that was different than the one charged in the case. When he

was brought into court on the misdemeanor, his felony OR was revoked. Defendant was offered credit for time served on the misdemeanor, one year of probation and that he could be released on OR until the felony matter was heard. Defendant refused to plead to anything, stating he had done nothing wrong.

Zywiciel told defendant he would attempt to get the deputy district attorney to agree to one year, but defendant would have to plead guilty to the misdemeanor. Defendant stated he could not believe anything Zywiciel told him. Defendant then told Zywiciel he wanted another lawyer.

The trial court advised defendant it did not understand how Zywiciel had lied, as it appeared there was an initial offer of one year of probation, but defendant had rejected the offer. Once it was rejected, the district attorney could withdraw the offer. Defendant was not entirely clear on whether or not—if the offer of one year probation was given again—he would take the offer. Defendant insisted that Zywiciel had not told him the truth, but the trial court did not understand how counsel had lied.

The trial court was willing to take a plea to the misdemeanor with the one-year probation term. Defendant asked if he was getting a new attorney and the trial court responded it did not see any reason to remove Zywiciel. Defendant decided he wanted to proceed to trial on the misdemeanor charge. At the next hearing on January 8, 2016, the misdemeanor was dismissed for lack of evidence. The trial court agreed to release defendant on bail.

The next hearing on the case was conducted on December 19, 2016, after several continuances. Defendant was represented by Deputy Public Defender Mark Bruce. Defendant sought to have Bruce removed and another *Marsden* hearing was conducted.

Defendant insisted that at each court appearance over the prior year, he had wanted the case to proceed to trial. Defendant believed each time he came to court that the case was going to proceed but Bruce would ask for a continuance. At the previous court appearance, they argued in the hall about the continuance. Bruce stated, in front of other persons in the hall, that everyone in the public defender's office thought he was an "asshole" besides Bruce. Defendant did not believe he could receive a fair trial. Defendant also accused Bruce of lying to him. Defendant wanted to move the trial to another venue because of what Bruce said to him in the hallway.

The trial court asked, "What else?" Defendant responded, "That's it." Defendant then stated he had one more thing to say to the court and the trial court allowed him to talk. Defendant began to talk about the time a bench warrant was issued against him, and the trial court responded, "Forget that. I don't care. I literally don't care."

The trial court reviewed the continuances in the case. It noted that since March 2, 2016, defendant had been out of custody on the case. Defendant explained that prior to that, they had put him in custody on a "fucking ticket in Vegas." Defendant additionally stated, "No shit. I spent 54 days in jail because of it." The trial court told defendant he would remand him to custody if he did not stop using bad language.

Defendant apologized and stated that he was frustrated by the length of time the case had been ongoing. He complained he was not getting proper representation. The trial court clarified that Bruce had not started representing defendant until March 2016, and it wanted to know what Bruce had done to delay the case since March.

Bruce indicated he and defendant had been outside the courtroom in the hallway and defendant had been yelling at him. Bruce did raise his voice but told defendant he believed he was innocent. Bruce was appointed in March and continued the case so he and defendant could discuss the case. The preliminary hearing was set for May. On the day of the preliminary hearing, defendant brought his service dog and the trial court wanted to continue the case in order to be given the paperwork confirming that it was a service dog. Bruce convinced defendant to waive the preliminary hearing so that defendant could be kept out of custody (defendant had a heated argument with the trial judge set to hear the preliminary hearing) and the case was set for arraignment on June 3, 2016.

The matter was set for trial the beginning of August 2016. Defendant was late to an appearance and the matter was continued. He also failed to appear on September 2, 2016, and a bench warrant was issued. The matter had to be continued. Defendant was upset that a bench warrant was issued against him and yelled at Bruce. Bruce told him the other attorneys in his office thought he was going to be convicted but he thought he had a chance to win at trial. Bruce did not deny that he may have said that other attorneys in his office thought defendant was an asshole, but Bruce also told defendant he thought defendant was innocent and wanted to represent defendant at trial. Bruce denied

he had lied to defendant. Bruce had represented difficult clients in the past and he felt he was capable of dealing with defendant. Bruce personally had no problems with defendant.

Defendant again complained about the number of continuances. The trial court noted that one of the continuances was due to defendant failing to appear. The other continuances were within normal time frames for preliminary hearing to the time of trial.

The trial court explained that unfortunately the public defender's office had a large volume of cases. In listening to the reasons for the continuances, the trial court found no fault in how the case was handled. Also, the incident in the hallway did not affect Bruce's representation of defendant or Bruce's ability to put forth his best effort in the case. The trial court was aware Bruce was more than competent based on prior cases and that he would do his best for defendant. The trial court found defendant had received adequate representation and that there was not an irreconcilable conflict in the attorney/client relationship. Defendant stated for the record that he objected to Bruce being his attorney.[4]

2. *ANALYSIS*

"Criminal defendants are entitled to the assistance of counsel in their defense. [Citation.] A court must appoint counsel to represent an indigent defendant. [Citation.] A defendant also has a right to seek substitute counsel under *Marsden* if the defendant can show that continued representation by present counsel would substantially impair or

[4] Defendant brought an additional *Marsden* motion at the time of the hearing on the restitution fine but he does not contest the finding of that hearing.

deny his or her right to effective assistance of counsel." (*People v. Knight* (2015) 239 Cal.App.4th 1, 5-6.)

" 'When a defendant seeks substitution of appointed counsel pursuant to . . . *Marsden* . . . , "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' [Citation.] 'A trial court should grant a defendant's *Marsden* motion only when the defendant has made "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." ' " (*People v. Streeter* (2012) 54 Cal.4th 205, 230, overruled on other grounds in *People v. Harris* (2013) 57 Cal.4th 804, 834.)

"A trial court errs under *Marsden* by not affording a criminal defendant the opportunity to state all his reasons for dissatisfaction with his appointed attorney. [Citations.] On the other hand, a defendant is not entitled to keep repeating and renewing complaints that the court has already heard." (*People v. Vera* (2004) 122 Cal.App.4th 970, 980.)

" 'We review the denial of a Marsden motion for abuse of discretion.' [Citation.] 'Denial is not an abuse of discretion "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." ' " (*People v. Streeter*, *supra*, 54 Cal.4th at p. 230.)

Here, defendant complains he was not allowed to express all of his reasons for his dissatisfaction with counsel; specifically, the ways that Bruce lied to him. This court has reviewed the entirety of the trial. It was clear that defendant frequently interrupted the trial court and could be difficult. It was also clear that he accused his first attorney of lying to him but could not provide adequate reasons for his belief. The record here supports that the trial court gave defendant every opportunity to state his dissatisfaction with counsel.

Defendant accused Bruce of lying to him. The trial court asked, "What else?" Defendant responded, "That's it." Defendant then stated he had one more thing to say to the court and the trial court allowed him to talk. Defendant began to talk about the time a bench warrant was issued against him, and the trial court responded, "Forget that. I don't care. I literally don't care." Defendant was given an opportunity to expand on his statement that Bruce lied to him, but he failed to provide any further reasons. The trial court adequately inquired of defendant. Further, Bruce was willing to provide the best representation to defendant despite defendant being difficult. The trial court did not abuse its discretion by denying defendant's *Marsden* motion.

DISPOSITION

We affirm the judgment in its entirety.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

I concur:

McKINSTER
Acting P. J.

[*People v. Cromer*, E069960]

RAPHAEL, J., Concurring.

I join the result of the opinion and agree with nearly all of its analysis. I write to clarify the harmless error standard that I would apply.

The error here was what could be called "alternative legal theory error." Such error occurs where a jury was instructed on two legal theories, one of which was erroneous. As to such error, I would apply the test provided by our Supreme Court in *People v. Chun* (2009) 45 Cal.4th 1172. There, the court held that an erroneous instruction on an invalid legal theory is harmless "[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary [to support the valid legal theory]." (*Id.* at p. 1205.) Thus, our Supreme Court has given us a standard that has us review the actual verdict and the evidence to determine whether we have a reasonable doubt about whether the jury *in this case* relied on the valid theory. Applying that standard, I would hold that the instructional error was harmless for the reasons provided in the opinion.

Our opinion today applies what it calls the "traditional *Chapman v. California* (1967) 386 U.S. 18 beyond-a-reasonable-doubt standard." (Maj. opn., *ante*, at p. 8.) It articulates that standard as determining whether it is clear beyond a reasonable doubt that "a rational jury" would have rendered the same verdict without the error. (*Ibid.*) In doing so it cites *People v. Merritt* (2017) 2 Cal.5th 819, 831. *Merritt* was a case involving what could be called "missing element error," rather than alternative legal theory error. Where an element is missing from a jury's instructions, it is necessary for a

reviewing court to consider what a hypothetical rational jury would have done absent the error, because the actual jury was not provided with an instruction on the correct law. In contrast, where there is alternative legal theory error, we arguably need not consider what a hypothetical properly instructed jury would have done but, instead, we can examine the record to determine whether we have a reasonable doubt about what the actual jury did. *People v. Chun*, *supra*, 45 Cal.4th 1172 does not discuss "a rational jury" and does not cite *Chapman*: it simply applies the test stated above.

Further guidance may come from our Supreme Court in the future. (See maj. opn., *ante*, at p. 9, fn. 3 [noting the court has granted review in *People v. Aledamat* (2018) 20 Cal.App.5th 1149].) Unless and until our Supreme Court provides different guidance, I would not conflate the "missing element" harmless error standard with the "alternative legal theory" one.

RAPHAEL

J.